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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SMDM PROPERTIES, INC., et al. Plaintiffs and Appellants, v. DEVELOPERS DIVERSIFIED REALTY CORP., Defendant and Respondent	A126643 (Contra Costa County Super. Ct. No. C06-01723)

INTRODUCTION

Plaintiffs SMDM Properties Inc. (SMDM) and Sonja Colbert appeal from a judgment of the Contra Costa County Superior Court against them and in favor of defendants Developers Diversified Realty Corporation (DDR) and Richard Zoubovitch on plaintiffs' action arising from their attempt to lease space in a shopping center owned by DDR.[1] Plaintiffs contend the court erred in sustaining, without leave to amend, defendants' demurrer to causes of action for breach of contract and breach of the covenant of good faith and fair dealing; that the court erred in granting defendants' motion to strike attorney fees from the complaint before ruling on the demurrer; and that the court erred in granting summary judgment on the remaining causes of action for promissory estoppel and negligent misrepresentation. We shall conclude the trial court erred in granting summary judgment on the negligent misrepresentation cause of action

[1] On this appeal plaintiff SMDM Properties, Inc. is represented by counsel; plaintiff Sonja Colbert appears in propria persona. Plaintiffs have filed joint briefs.

with respect to representations made by Zoubovitch regarding a summary list of exclusions. We shall therefore reverse the judgment in part.

FACTS

Most of the underlying facts are undisputed. The parties mainly disagree as to the conclusions and legal implications to be drawn from the facts. In 2002, defendant DDR purchased the Hilltop Plaza shopping center, located in Richmond, California. In the Spring of 2006, plaintiff Colbert, the founder and president of plaintiff SMDM Properties, Inc. and a real estate broker, contacted defendant Zoubovitch, DDR's senior leasing director for the center, to ask about leasing space there for operation of a Wings To Go restaurant franchise. The space was located next to one of the center's anchor tenants, Ross Dress For Less (Ross). At the time the lease was being negotiated, Ross had a provision in its lease with DDR giving it the right to prohibit more than three "non-sit down restaurants" within a certain proximity of Ross and there were already three such restaurants in that area.[2]

Over the next few months, Zoubovitch and Colbert negotiated the basic terms of the lease. Defendants maintain and plaintiffs dispute that during that time, Zoubovitch, consistent with his usual practice, checked the center's summary list of exclusives and restrictions to determine whether plaintiffs' use might violate an existing tenant's lease. The summary list usually is prepared by a DDR in-house paralegal, and is intended to list the restrictive covenants contained in all of the center's tenant leases, which may prohibit certain uses within the center. Zoubovitch particularly wanted to ensure that no other restaurants in the center had restrictions or exclusive-use provisions that would affect a

[2] The clause of the Ross lease to which this restriction refers provides: "No restaurant shall be permitted in the Shopping Center within five hundred (500) feet of the Store, except as follows: Barnes & Noble may have a coffee bar; sit down restaurants or fast food restaurants may be operated on Pads 1, 2, 3 and/or 4; and as many as three (3) non-sit-down restaurants (each not exceeding 1,500 square feet of Leasable Floor Area) may be operating in Stores B shown on the site plan. 'Non-sit-down restaurants' shall mean food vendors which have limited seating only as an ancillary element of décor, such as, for example, a cookie store, donut shop, ice cream or yogurt shop, delicatessen, etc."

Wings To Go menu. His main concern at the time was the existing Subway sandwich shop. Defendants maintained that neither Zoubovitch nor his lease administrator's check of the summary list revealed any issues and Zoubovitch emailed Colbert on April 7, 2006 that his "initial check of the summary list exclusives for the center indicate that there are none that would [a]ffect the menu," and that he would have the lease administrator verify that information. A summary list produced during discovery, and dated July 11, 2006, identified the following restriction with respect to Ross: "Landlord shall not lease to a restaurant within 500 feet of Tenant's store except for Barnes & Nobles coffee bar; Pads 1, 2, 3 &4 and as many as 3 non-sit down restaurants may be operating in Store B so long as its not in excess of 1,500 square feet." (Plaintiffs maintain that, contrary to Zoubovitch's declaration, he either did not check the summary list at that time or that he should have known of all restrictions and exclusions included in all of the center's tenants' actual leases in addition to those in the summary list.)

On May 27, 2006, defendants sent to Colbert a letter of intent (hereafter "Letter of Intent" or "LOI") outlining the general terms and conditions of a lease for space in the center. The first paragraph of this Letter of Intent transmission stated that it was "a proposal which outlines the terms and conditions of a lease for the above referenced center. Upon your execution and return, this correspondence will constitute a non-binding letter of intent." There followed a summary of "general terms" that would be incorporated into the lease, including that it would be personally guaranteed by Colbert for the first two years. The Letter of Intent contained the following disclaimer immediately above the signature line:

"**DISCLAIMER**:

"Landlord and Tenant hereby acknowledge and agree that this non-binding letter of intent does not address all essential terms and conditions of the transaction and that a binding agreement shall not exist between the parties until a mutually acceptable lease agreement ('Lease') has been executed and delivered to both parties.

"Landlord and Tenant acknowledge and agree that either party shall have the right to terminate negotiation of a formal lease agreement for any reason or for no reason

whatsoever. Neither party owes the other party any duty to negotiate a formal and final lease agreement. Neither party may claim any legal rights against the other by reason of any actions taken in reliance upon this non-binding letter of intent, including, without limitation, any partial performance of the transaction contemplated herein.

"If the foregoing is acceptable, please sign and date this letter in the spaces provided below and return this letter to me on or before June 1, 2006. Please contact me should you have any questions."

In a series of emails over the next several weeks, Colbert and Zoubovitch continued to discuss the lease terms. Zoubovitch sought from Colbert certain financial information required by defendants to assess the creditworthiness of SMDM and Colbert as a personal guarantor. Zoubovitch advised Colbert that after receiving these "financials," DDR's credit manager would issue a report that Zoubovitch would present to his boss, along with the executed Letter of Intent, and a landlord work estimate as the "deal package."

On May 31, 2006, Colbert, as president of SMDM Properties, Inc., signed the Letter of Intent, eliminating a provision for "percentage rent," as she and Zoubovitch had agreed.

On June 18, 2006, Zoubovitch advised Colbert by email that "[s]ince the lease hasn't been submitted for approval yet, it likely won't be ready to sign until the middle of July at the earliest, and that is if you don't make any changes to the initial draft, which never happens, so later in July is more likely. . . ." Zoubovitch offered to add another 30 days to the buildout period, so the rent and other charges would not start until the earlier of opening or 150 days after delivery of the premises with the landlord's work (including installation of a gas line and odor proofing the space) completed. The email also advised that "[w]e won't start that work until the lease is signed [and] the delivery of the space won't be until that work is done, which should be at least a couple more

weeks."[3] On June 23, 2006, Zoubovitch emailed Colbert, inquiring, "What is happening? Do you want me to submit the deal for approval now?" Late that night, Colbert responded by email that she was attending training at Wings To Go headquarters and would not return until July 3rd. She stated that "drawings are being initiated by our Architect for the shell first." The next day, Zoubovitch emailed Colbert, stating: "I have what I need to send the deal through to my boss for approval. If approved, the Legal Department will send you the lease draft within about a week from approval. Do you want me to submit it for approval?" On June 29, 2006, Zoubovitch sent the following email to Colbert: "Sonja, [¶] Please advise if you want me to send the deal to my SVP for approval now, which an attorney in our Legal Department will then draft and send out the lease. Yesterday, I received an unsolicited [letter of intent] for the space from a broker representing a national company. I won't even respond to it, if our deal is in process, but [i]f you don't tell me to go ahead and submit the deal for approval, I will have to do so. [¶] I will call your office and leave a voice mail also."

There followed a series of emails on July 4th.[4]

Colbert emailed Zoubovitch that she had returned from training late the night before. She stated: "First let me tell you that I would not be in training or paying again for plans for a different space if I did not sign an LOI and submit financial to you that were thereafter approved by your credit dept. Corporate instructed me to begin training on June 25 after the LOI was approved by your company. . . . [¶] If your company chooses to open negotiations with a national or otherwise tenant especially if the rent and deal is better for you I will back out, besides everything is cheaper for us across the street

[3] It appears from a June 18th email from Colbert that she "will not be signing that quickly or maybe not at all. We've come into some problems with the space." Colbert explained that defendants might be unable to use 1,400 square feet of the 2,984-square-foot space because it cost too much to cut the existing unit into half, and electrical, HVAC, plumbing and gas would need to be upgraded. This email was submitted on the summary judgment motion. It was not attached to the complaint and was not considered by the court in granting the demurrer.

[4] The exact sequence of emails is somewhat unclear, as the time notations do not always appear to coincide with the content of the emails.

and with visibility on Fitzgerald drive where all the restaurants are and there is a new vacancy as of June 1 in the largest grocery Anchored center on this drive in which we applied along with six other restaurant franchises and they accepted us this past early February and denied the rest. [¶] Just let me know, we're pretty flexible, also our drawings for the other space have been done months ago and the owner and I . . . share the same architect because they designed that center. So we won't be mad at you! We have two other options [i]f you change your mind. Check out your deal and let me know. Attached is a first floor plan that I will instruct the architect tomorrow to change the entrance, Counter and Round seating booths which are not grand enough and missing. Anyway let me know what you all decide."

Zoubovitch emailed Colbert: "All I want to know is are you ready to move ahead with our deal and for me to get final deal approval from my boss, which will then mean that Legal will send you the draft lease in about a week."

In another email, Colbert advised Zoubovitch: "We're not interested in any other company and have not contacted them. I was simply saying if you have a better offer we understand but let us know soon because I know you have a boss and things do change, and we don't have any clause in the LOI that would prohibit you from entertaining another offer. . . ." Zoubovitch responded: "Since we are so far along on this deal and it is ready for me to submit for approval, the only way I would start on another deal would be if you told me that you were not ready to move ahead with us on this one. I don't want to get the deal approved and a draft lease sent out to you if there is a chance that you will not go forward with the deal. This is what I need you to tell me." Colbert responded: "Submit your deal, I thought all my actions gave you notice to do so[.]" Zoubovitch emailed Colbert: "This would mean that you are only pursuing our deal and are not going [to] decide to go across the street after we have one of our attorneys draft the lease and send it to you. [¶] All I want to know is are you ready to move ahead with our deal and for me to get final deal approval from my boss, which will then mean that Legal will send you the draft lease in about a week."

On July 6, 2006, Zoubovitch emailed Colbert: "My boss has approved the deal. It is on its way to Legal to draft the Lease. When you get it, it will come with a letter from the attorney who drafts it. Make sure that you direct all comments to that attorney, as that is the fastest way to get to a signed lease. It will arrive via FedEx to your address . . . ."

On July 20, 2006, Zoubovitch emailed Colbert that defendants' attorney had started drafting the lease, but that the lease administrator had found a restriction in an amendment to the Ross lease that was not listed on the summary of restrictions for the center. According to Zoubovitch, the restriction was in place before DDR's ownership of the center and was "buried in the lease file, but appears to be a valid amendment." He advised Colbert that the attorney was looking into it and trying to determine if DDR would be violating the restriction by allowing the Wings To Go in that space. He advised that it might be a situation requiring the parties to seek a waiver from Ross. Colbert responded that same day: "Please let me know soon Mr. Z, I've spent a lot of money, so I can stop writing checks I've already flown to LA an[d] purchased all the furniture and other items last [F]riday, not to mention the architect bill." On July 22, 2006, Colbert inquired whether SMDM could purchase a different pad of land in the center as plaintiffs' plans "[could] still work on this pad." Two days later, Zoubovitch advised Colbert that defendants had confirmed that they needed Ross's consent to the lease, warning that the process might take a long time, and asking whether plaintiffs wished defendants to seek Ross's consent. He also told her the alternate location was unavailable as there was a CalTrans right of way through the pad and no buildings were allowed. No other parcels were available. In the meantime, he asked whether she wanted defendants to send the lease draft to her to "work through" so that if defendants succeeded in obtaining Ross's permission, the parties would be ready to execute the lease. Colbert replied that plaintiffs had no choice, but to wait for Ross's permission, as plaintiffs had "spent too much money."

The draft lease was sent to Colbert by DDR's legal counsel on July 28, 2006. The letter accompanying the 43-page lease, personal guarantee and exhibits sent to Colbert

stated in relevant part: "Enclosed for your review is a copy of the proposed lease and personal guarantee for the above-referenced unit. [¶] Please review the documents and provide me any comments you may have. If the documents are acceptable, please contact me as soon as possible and I will forward execution copies to your attention immediately. I am requesting your prompt response on these documents. In the event a response is not received from the Tenant within fourteen (14) days from the date of this letter, negotiations may, at the option of Developers Diversified, be terminated and Developers Diversified may pursue other tenants for this space. [¶] Please be advised that the agreement does not constitute an offer and the terms thereof are not binding upon the Landlord unless and until you receive a copy of the document executed by the Landlord."

On August 4, 2006, Colbert sent a fax to defendants with proposed changes to the lease, some of which related to key terms, including eliminating the lease prohibition on the sale of alcoholic beverages (Lease, page 2, item 4), correcting the square footage stated therein by reducing it from 2,984 to 2,888, and objecting to attorney fee provisions.

On August 16, 2006, Zoubovitch emailed Colbert that Ross did not approve the waiver. Zoubovitch said he would ask his boss to speak to his contact at Ross to see if that was their final decision. He further stated, "as of today, it doesn't look good. I haven't dealt with Ross a lot, but I did a deal with them about 5 years ago and they were pretty tough on the exclusives and restrictions they wanted in the lease and weren't very flexible. . . ." This litigation followed.

STATEMENT OF THE CASE

Complaints. On September 1, 2006, plaintiffs filed a complaint against DDR and Zoubovitch, and a first amended complaint on March 19, 2007. On June 19, 2007, the court heard argument on defendants' demurrer and on their motion to strike and granted both motions. On July 16, 2007, the trial court entered an order sustaining defendants' demurrer to the first amended complaint, *with leave to amend*. Plaintiffs filed a second amended complaint thereafter. The second amended complaint asserted causes of action for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, specific performance, promissory estoppel, deceit, negligent misrepresentation,

and unfair business practices. The second amended complaint attached as exhibits thereto over 100 pages of emails, correspondence and other documents that plaintiffs contended demonstrated a binding agreement between the parties.

Demurrer. Defendants filed a demurrer to each cause of action and filed a motion to strike the second amended complaint's prayer for punitive damages. The trial court issued a tentative ruling sustaining the demurrer without leave to amend as to all causes of action except promissory estoppel and negligent misrepresentation, and sustaining the demurrer without leave to amend on all causes of action against defendant Zoubovitch, on the ground that there was no allegation of any action he had taken outside of the scope of his relationship with defendant DDR. The tentative ruling also stated the motion to strike punitive damages was moot because the second amended complaint no longer contained a deceit cause of action upon which to base a claim for punitive damages.

Following oral argument, the court took the matter under submission and on September 25, 2007, entered an order adopting its tentative ruling.

Summary Judgment. On December 5, 2008, defendant DDR moved for summary judgment or summary adjudication on the two remaining causes of action for negligent misrepresentation and promissory estoppel. The parties filed their separate statements of material fact and defendant DDR filed objections to certain evidence submitted by plaintiffs in opposition to the summary judgment motion. Following oral argument on March 13, 2009, the court took the matter under submission. On March 24, 2009, the trial court entered its order granting defendant DDR's summary judgment motion.[5]

The court reasoned: (1) a lease agreement was never signed, and (2) the July 6, 2006 email from Zoubovitch to Colbert stating that Zoubovitch's boss "had approved the deal and that it was on its way to the legal department for review and preparation of a draft lease [did] not constitute a clear and enforceable promise sufficient to support either

[5] In Judge Craddock's absence, a pro tem judge initially issued a tentative ruling overruling defendants' objections to evidence as to all but three items and *denying* the summary judgment motion. When Judge Craddock heard the motion, she announced at the outset that she was inclined to set aside that tentative ruling.

a [cause of action for] promissory estoppel or negligent misrepresentation." Rather, it "was a statement made in the context of negotiations pursuant to the letter of intent and until the lease was signed, either party could terminate the negotiations." The court further found that plaintiffs had presented no admissible evidence of a misrepresentation of a fact that was false. Therefore, the court concluded that defendant DDR had met its initial burden under Code of Civil Procedure section 437c, of showing the action had no merit. At that point, the burden shifted to plaintiffs to set forth specific facts showing that a triable issue of material fact existed and plaintiffs failed to meet that burden.

Thereafter plaintiffs proceeded to request and obtain entry of default as to defendant Zoubovitch. The court set aside the default and dismissed Zoubovitch from the case.[6]

The court entered judgment on the second amended complaint against plaintiffs and in favor of defendants on July 29, 2009. This timely appeal followed.

DISCUSSION

I. Demurrer to Contract-Based Causes of Action

Plaintiffs first challenge the trial court's grant of the demurrer to the second amended complaint, contending that the trial court erred in ruling as a matter of law that no contract was formed by the Letter of Intent and the numerous emails between the parties, particularly those of July 4 and 6, 2006 advising Colbert that "my boss has approved the deal."[7]

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[6] Plaintiffs have made no arguments on appeal that the court erred in sustaining the demurrer as to defendant Zoubovitch. Nor does plaintiffs' "Certificate of Interested Persons" on appeal identify Zoubovitch as a party. Plaintiffs have clearly waived any claim that the court erred in granting the demurrer on all causes of action as to Zoubovitch or in dismissing him from the action.

[7] On this appeal, plaintiffs challenge only the sustaining of the demurrer to their causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing. They make no argument that the court erred in sustaining the demurrer to their declaratory relief, deceit, unfair business practices, and specific performance causes of action. They have therefore waived any such claims on this appeal. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶ 9.21, p. 9-6.)

A. *Standard of Review*

"Our review of the sufficiency of a complaint against a general demurrer, which is de novo, is guided by long-settled rules. ' "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.]' . . . . (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)" (*Fonseca v. Fong* (2008) 167 Cal.App.4th 922, 929.) In addition, we consider the complaint's exhibits. (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.) "Under the doctrine of truthful pleading, the courts 'will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.' [Citation.] 'False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded . . . .' [Citations.]" (*Ibid.*)

"Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]' (*Blank v. Kirwan*[, *supra*,] 39 Cal.3d [at p.] 318.)" (*Fonseca v. Fong*, *supra*, 167 Cal.App.4th at p. 929.)

B. *No Valid and Binding Contract Absent Compliance With Condition of the Letter of Intent*

The second amended complaint's causes of action for breach of contract (second cause of action) and breach of the covenant of good faith and fair dealing (third cause of action) each depend upon the existence of a valid and binding contract between the parties. (See, e.g., *Guz v. Bechtel National Inc.* (2000) 24 Cal.4th 317, 349 [covenant of good faith and fair dealing cannot be endowed with an existence independent of its

contractual underpinnings]; *Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026 [no obligation to deal fairly or in good faith absent an existing contract]; *Beck v. American Health Group Internat., Inc.* (1989) 211 Cal.App.3d 1555, 1563 (*Beck*) [same]; *Hess v. Transamerica Occidental Life Ins. Co.* (1987) 190 Cal.App.3d 941, 944-945 [same].)[8]

Plaintiffs argue that the Letter of Intent and the lengthy series of emails, including Zoubovitch's representation that he was forwarding the package to his boss for "final approval," and culminating in the July 6, 2006 email from Zoubovitch informing Colbert that "my boss has approved the deal," when viewed as a whole, resulted in a binding contract. They argue that the parties had achieved a meeting of the minds; that such conduct and emails superseded the Letter of Intent requirement of a final executed written lease; and that any requirement of an executed writing was waived when Zoubovitch informed Colbert of that approval. We disagree.

In *Beck, supra*, 211 Cal.App.3d 1555, the court summarized the principles governing the trial court's review on demurrer of a writing alleged to be a contract between the parties: " ' "Ordinarily, a written contract is sufficiently pleaded if it is set out in full or its terms alleged according to their legal effect. . . . But if the instrument is ambiguous, the pleader must allege the meaning he ascribes to it. [Citations.]" [Citation.] Where a written contract is pleaded by attachment to and incorporation in a complaint, and where the complaint fails to allege that the terms of the contract have any special meaning, a court will construe the language of the contract on its face to determine whether, as a matter of law, the contract is reasonably subject to a construction sufficient to sustain a cause of action for breach.' [Citation.] This rule applicable on demurrer 'is simply a variation on the well-recognized theme that " 'It is . . . solely a

[8] We note that a cause of action will lie for breach of a contract to negotiate the terms of an agreement. (*Copeland v. Baskin Robbins U.S.A.* (2002) 96 Cal.App.4th 1251, 1253.) Plaintiffs do not contend such a case is presented here and we find none under the clear terms of the Letter of Intent.

judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.' " [Citations.]' [Citation.]" (*Id.* at p. 1561.)

" ' "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." [Citation.]' (*Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59.) *Thus, where it is part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract.* [Citations.]" (*Beck, supra*, 211 Cal.App.3d at p. 1562, italics added.)

The allegations of the second amended complaint, together with the exhibits incorporated therein, establish that no contract existed between the parties. The parties agreed in the Letter of Intent that no contract would be formed until they executed a written lease agreement. This condition never occurred and no later email or other document appended to the second amended complaint established that a lease was ever signed and delivered.

In their appellate brief, plaintiffs point to the test for admissibility of extrinsic evidence and appear to argue that the Letter of Intent and the emails are ambiguous as a whole. They argue that, when considered together with evidence regarding the circumstances surrounding the making of the asserted agreement, the entirety of the communications are susceptible to the interpretation that a contract was formed. However, we note the absence of any *allegations in the complaint* that the asserted contract was "ambiguous" or that particular "extrinsic evidence" would disclose such an ambiguity rendering the documents as a whole susceptible to plaintiffs' interpretation that they constituted a contract. (See *Beck, supra,* 211 Cal.App.3d at p. 1561 [to survive the demurrer the plaintiff must allege the meaning that he or she ascribes to an ambiguous writing incorporated into the complaint].) " ' ". . . It is perfectly proper to set out a contract *in haec verba.* But in such case, if the contract is uncertain, the pleader must put some definite construction on it by averment." ' [Citations.]" (*Ibid.*) As in *Beck,*

plaintiffs' second amended complaint does not allege their interpretation of the attached and incorporated writings, save the conclusory allegation that the writings are the contract of the parties. (*Ibid.*)

More importantly, the Letter of Intent could not have been more clear and unambiguous. There was to be no binding agreement "until a mutually acceptable lease agreement ('Lease') has been *executed and delivered* to both parties." (Italics added.) Until that time, either party could terminate negotiations for any reason or for no reason, imposing no duty to negotiate in good faith. Nor could either party "claim any legal rights against the other by reason of any actions taken in reliance upon this non-binding letter of intent." The emails and documents appended to and incorporated into the complaint were completely consistent with this plain language. Both parties contemplated the deal would not be final until the Lease was executed. Zoubovitch consistently told Colbert that after approval by his boss, the deal would go to "legal" for drafting of the lease and thereafter she should communicate any *changes* to the attorney who drafted the lease as the fastest way to obtain *a signed lease*.

Colbert's subjective claims regarding her understanding of the meaning of these documents and emails is not the test. Contract interpretation is based upon "[t]he objective intent as evidenced by the words of the instrument, not the parties' subjective intent . . . . [Citation.]" (*Beck, supra,* 211 Cal.App.3d at p. 1562.)

We recognize that "[a] manifestation of assent sufficient to conclude a contract is not prevented from [so operating] because the parties manifest an intention to memorialize their already made agreement in writing. [Citations.]" (*Rennick v. O.P.T.I.O.N. Care, Inc.* (9th Cir. 1996) 77 F.3d 309, 313-314 (*Rennick*).) That was not the case here. "[I]f a party knows that the other intends no obligation to exist until the written agreement is made, the earlier manifestation does not constitute a contract. [Citations.]" (*Id.* at p. 314.) That was the case here, as it was in *Rennick.*[9] In *Rennick,*

[9] *Rennick* involved a suit based upon a letter of intent between a franchisor of medical therapy services (O.P.T.I.O.N), a prospective franchisee (Rennick), and an investment firm (Vantec), regarding their potential exclusive franchise agreement. In

the Ninth Circuit applied California law to affirm summary judgment on the basis that no contract had been entered by the parties. There, a letter of intent memorializing oral negotiations clearly indicated that it did not itself constitute a contract and there was no subsequent signed written contract, despite the parties' having ceremoniously shaken hands following negotiations leading to the letter of intent, and despite the substantial reliance of one of the parties on the letter of intent. (*Id.* at pp. 311, 313-316.) In that case, the letter of intent was explicit that it did not bind the parties to the venture and that there would be no contract until the parties' boards of directors approved a written contract, a condition that never occurred. (*Id.* at p. 314.) According to the court, "[*i*]*f there 'is a manifest intention that the formal agreement is not to be complete until reduced to a formal writing to be executed, there is no binding contract until this is done.*' [Citations.] An agreement to make an agreement, without more, is not a binding contract. [Citation.]" (*Id.* at p. 315, italics added.) In the instant case, the Letter of Intent manifested the intention of the parties that there be no binding agreement until reduced to a formal written and executed lease. The parties were free to structure their negotiations and their deal in this way.

It is true, as plaintiffs point out, that in *Rennick,* the alleged agreement (and handshakes) preceded the letter of intent setting out the terms of an agreement, whereas in this case the allegation is that the contract included the Letter of Intent and the later emails. As *Rennick* pointed out, letters of intent have particular utility in contexts such as this. "Generally, 'letter of intent' refers to a writing documenting the preliminary

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reliance on the prospective franchise deal, Vantec took over the company of the prospective franchisee, Rennick, and the parties' business consultant took a majority interest in Vantec. Vantec issued a press release announcing its expectation of a deal. (*Rennick, supra,* 77 F.3d at pp. 311-313.) O.P.T.I.O.N decided not to go through with the transaction and no contract was signed. Rennick and Vantec sued O.P.T.I.O.N., for various contract-based causes of action, and for promissory estoppel, asserting the parties had entered into an oral contract, which was simply memorialized by the letter of intent. The court rejected this characterization, finding as a matter of law that the letter of intent manifested an intent that the parties would not be bound until a written contract was made and approved by their boards of directors. (*Id.* at p. 316.)

understandings of parties who intend in the future to enter into a contract. [Citations.] '[T]he purpose and function of a preliminary letter of intent is not to bind the parties to their ultimate contractual objective. Instead, it is only "to provide the initial framework from which the parties might later negotiate a final . . . agreement, if the deal works out." ' [Citation.]" (*Rennick, supra,* 77 F.3d at p. 315.) "Commonly a letter of intent is used so that people negotiating toward an agreement, who do not yet have one, can get their preliminary inclinations down on paper without committing themselves. This avoids a misunderstanding that a commitment has been made. It also has value in preserving a common understanding of what has been talked about in earlier negotiations, before spending the time and money on later negotiations, and justifies further expenditures on attorneys and others. It may be used to stimulate negotiations with third parties, as where a shopping center developer shows a prospective lender a letter of intent from a potential anchor tenant, to induce the prospective lender to commence negotiations. [¶] *All these purposes are defeated if what was meant to be a nonbinding letter of intent is allowed to form the basis for a damages award. Letting a nonbinding letter of intent go to a jury as a possible basis for compensatory and perhaps punitive damages makes it too risky to sign one, so negotiators are deprived of this useful intermediate device between vague feelers and a binding contract.*" (*Rennick,* 77 F.3d at p. 315, italics added.) We believe the same considerations apply where a letter of intent that expressly states there will be *no contract* until a final agreement is executed is asserted to provide the foundation for a contract stitched together from the letter of intent and subsequent emails and other communications between the parties, in the absence of some clearly manifested intent to waive the execution requirement.[10]

[10] In addition, we note that at least one material term appears not to have been settled even after the lease was drafted. Colbert objected to the no alcoholic beverage clause of the draft lease. (See *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357-358 [no contract may exist until there is a meeting of the minds on *all material points*].)

C. *No Waiver*

We also reject plaintiffs' claim that defendants *waived* the Letter of Intent requirement of a signed written lease. The second amended complaint contains no allegation that defendants "waived" the requirements of the Letter of Intent and our review of the documents and the communications between the parties appended to the complaint does not disclose any such waiver. "A waiver is an intentional relinquishment of a known right [citations]; may be expressed or implied [citations]; and may be implied from conduct inferentially manifesting an intention to waive. [Citations.]" (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 532-533.) " ' "The burden . . . is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.' " ' [Citations.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60; accord, *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1320 (*Habitat Trust*).) "Further, '[t]he pivotal issue in a claim of waiver is the intention of the party who allegedly relinquished the known legal right.' [Citation.]" (*Habitat Trust*, at p. 1320.)[11] At no point does it appear from the allegations of the complaint, from the documents and emails attached to the complaint, or from the conduct of the defendants, that defendants intentionally waived or relinquished their right not to be bound except upon execution of a written lease. As we have observed heretofore, in the same email that Zoubovitch told Colbert that his boss had approved the deal, he also told her that the next step was to send the package to "legal" for drafting of the lease and that upon receipt of the draft lease document, she should communicate any changes to the attorney who

[11] As one appellate court recently reiterated: "All case law on the subject of waiver is unequivocal: ' "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations]. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver." ' [Citations.]" (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd., supra,* 30 Cal.App.4th at p. 60.)

drafted the lease as the fastest way to obtain *a signed lease*. The boss's approval was one step on the way to an executed lease.

We conclude the court did not err in sustaining the demurrer. Plaintiffs have not suggested that the deficiencies in these causes of action could be cured by further amendment of the complaint and we see no likelihood of a successful amendment. Consequently, we find no error in sustaining the demurrer without leave to amend.

II. Summary Judgment

A. *Standard of Review*

" 'A trial court properly grants a motion for summary judgment only if no issues of triable fact appear and the moving party is entitled to judgment as a matter of law. [Citations.] The moving party bears the burden of showing the court that the plaintiff "has not established, and cannot reasonably expect to establish, a prima facie case . . . ." [Citation.]' [Citation.] '[O]nce a moving defendant has "shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established," the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff "may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . ." [Citations.]' [Citation.]" (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

" ' " '[W]e take the facts from the record that was before the trial court when it ruled on that motion," ' and ' " ' "review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " ' [Citations.]" (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1039, quoting *Lonicki v. Sutter Health Central* (2008) 43 Cal.4th 201, 206.) "We also ' " 'liberally construe the evidence in support of the party opposing

summary judgment and resolve doubts concerning the evidence in favor of that party.' " ' [Citations.]" (*Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 522.)[12]

B. *Promissory Estoppel*

Plaintiffs maintain that the trial court erroneously granted summary judgment on their promissory estoppel cause of action. They argue that Zoubovitch's statement that his "boss has approved the deal," in the context of the previous email communications, superseded contrary language in the Letter of Intent and induced plaintiffs' reliance and resulting damages. Once again, we disagree.

" 'In California, under the doctrine of promissory estoppel, "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires." [Citations.] Promissory estoppel is "a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced." ' [Citations.]" (*Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.)

" 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." [Citation.] . . .' (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 901-902)" (*Cooper v. State Farm Mutual Automobile Ins. Co.* (2009) 177 Cal.App.4th 876, 892, fn. 3.)

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[12] As a threshold matter, we reject defendants' request that we consider objections made and overruled by the trial court to plaintiffs' evidence on summary judgment. Although written evidentiary objections made before a summary judgment hearing preserve those objections for appeal (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 517, 534), nevertheless we conclude defendants have waived any challenge to those rulings on this appeal by their failure on appeal to identify those particular objections they maintain were improperly overruled, to make any adequate argument as to why the court erred, or to cite any authorities in support of such argument. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 9.21, p. 9-6.)

"Because promissory estoppel is an equitable doctrine to allow enforcement of a promise that would otherwise be unenforceable, courts are given wide discretion in its application. (*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 7-8 (*C & K Engineering*); see also *A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 472 ['Promissory estoppel has been characterized as a "*peculiarly equitable doctrine* designed to deal with situations which, in total impact, necessarily call into play discretionary powers" '].) This is confirmed by the last sentence of Restatement section 90 that allows courts to limit the remedy of that section 'as justice requires.' (*C & K Engineering, supra*, 23 Cal.3d at p. 8, italics omitted.)" (*US Ecology, Inc. v. State of California, supra*, 129 Cal.App.4th at p. 902.)

Cases have recognized that, conceptually, promissory estoppel claims are "basically the same as contract actions, but only missing the consideration element." (*US Ecology, Inc. v. State of California, supra,* 129 Cal.App.4th at p. 903.) The " ' "promisee's justifiable and detrimental reliance on the promise is regarded as a substitute for consideration required as an element of an enforceable contract . . . ." ' (*Toscano v. Greene Music*[, *supra*,] 124 Cal.App.4th 685, 692-693.)" (*US Ecology, Inc. v. State of California,* at p. 903.) The Restatement also recognizes that a promissory estoppel claim is equivalent to a breach of contract claim: "A promise binding under this section is a contract, and full-scale enforcement by normal remedies is often appropriate." (Rest., § 90, com. (d).)[13] Consequently, the party suing on a promissory estoppel theory must prove all the necessary elements of a contract other than consideration. (See *US Ecology, Inc. v. State of California, supra,* 129 Cal.App.4th at p. 902 [causation is an element of a promissory estoppel cause of action].)

Here, we have concluded that plaintiffs did not and could not state a cause of action for breach of contract under the facts alleged. Plaintiffs' contract-based causes of action did not founder upon their failure to allege or prove "consideration," for which

[13] "It is hardly chance that Restatement section 90 is located in the chapter of the Restatement concerning formation of contracts." (*US Ecology, Inc. v. State of California, supra,* 129 Cal.App.4th at p. 903, fn. 4.)

justifiable reliance might substitute. Rather, those causes of action failed because, under the plain and unambiguous terms of the Letter of Intent, no binding contract could be reached save in the manner set forth in that Letter of Intent—an executed written agreement—and neither the subsequent communications between the parties nor their conduct waived that requirement.

Moreover, as the court below concluded, the Zoubovitch email advising plaintiffs that his supervisor had approved the deal did not constitute a clear and unambiguous promise sufficient to support a promissory estoppel claim. The July 6th email that plaintiffs identify as the promise that induced their reliance states: "My boss has approved the deal. It is on its way to Legal to draft the Lease. When you get it, it will come with a letter from the attorney who drafts it. Make sure that you direct all comments to that attorney, as that is the fastest way to get to a signed lease. It will arrive via FedEx to your address . . . ." This email advised plaintiffs that a critical milestone to a final contract had been met and the deal was on its way toward finalization through preparation, revision and signing of a written lease agreement.

The court did not err in granting summary judgment on plaintiffs' promissory estoppel cause of action.[14]

C. *Negligent Misrepresentation*

Plaintiffs maintain that the trial court erroneously granted summary judgment on their negligent misrepresentation cause of action.

[14] Throughout plaintiffs' briefs, they refer to a congratulatory phone conversation between Zoubovitch and Colbert on July 7th, wherein Zoubovitch purportedly stated: "We have a deal." Their briefing refers to this alternatively as an oral statement and as the statement contained in the July 6th email. Plaintiffs fail to cite to the record where such oral statement may be located until their reply brief and examination of the citations there disclose the references are to the July 6th email we have quoted above. This oral statement was *not* included in plaintiffs' statement of disputed facts on summary judgment. It was *not* before the court in connection with the demurrer and we may not consider it on our review here. Were we to consider such oral statement on the summary judgment claim, it would make no difference to our analysis of the issues.

As our Supreme Court has stated: "The elements of fraud, which give rise to the tort action for deceit, are (1) a misrepresentation, (2) with knowledge of its falsity, (3) with the intent to induce another's reliance on the misrepresentation, (4) justifiable reliance, and (5) resulting damage. (*Small v. Fritz Companies, Inc.* (2003) 30 Cal.4th 167, 173 [(*Small*)].) The tort of *negligent misrepresentation*, a species of the tort of deceit [citation], does not require intent to defraud but only the assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. (*Small, supra*, 30 Cal.4th at pp. 173-174.)" (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1255.) "A defendant who makes false statements ' "honestly believing that they are true, but without reasonable ground for such belief, . . . may be liable for negligent misrepresentation . . . ." [Citations.]' (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407-408.) *However, a positive assertion is required; an omission or an implied assertion or representation is not sufficient.* (*Residential Capital v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 828; *Shamsian* [*v. Atlantic Richfield Co.* (2003)] 107 Cal.App.4th [967,] 984; see *Small*[, *supra*,] 30 Cal.4th 167, 174. . . .)" (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243, italics added.)

On appeal, plaintiffs identify two misrepresentations of material fact they contend were made by Zoubovitch. In addition to the Zoubovitch email advising Colbert that his boss had approved the deal, which plaintiffs characterize as telling her "in writing that a deal had been made," plaintiffs contend that "Zoubovitch stated to Colbert that he had conducted his due diligence and determined that there were no exclusions or restrictions which would adversely affect her operations as a Wings to Go restaurant." The undisputed statements of material fact and the documents that are relied upon therein show that plaintiffs' descriptions of these asserted misrepresentations are inaccurate.

As to the first asserted misrepresentation, we have quoted the email above and it did not say that "a deal had been made." Rather, it informed Colbert, truthfully, that Zoubovitch's boss had "approved the deal" and that it would be sent to "Legal" to draft the lease, which would be sent to Colbert for her review and comments and that she

should direct comments to the attorney as "the fastest way to get a signed lease." It is undisputed that Zoubovitch's boss had approved the deal and that the deal package was sent to defendants' legal department for review and preparation of a draft lease. Accordingly, this statement does not provide a basis for a negligent misrepresentation cause of action.

The second identified statement is more problematic. Plaintiffs characterize the statement as: "Zoubovitch stated to Colbert that he had conducted his due diligence and determined that there were no exclusions or restrictions which would adversely affect her operations as a Wings to Go restaurant." Rather, relying upon the Zoubovitch declaration and the April 7, 2006 email to Colbert, defendants stated as an undisputed material fact that both Zoubovitch and his lease administrator checked the summary list of exclusions and restrictions, that they found no potential issues, and that Zoubovitch advised plaintiffs of this fact on or about April 7, 2006.[15] That April 7, 2006 email stated in relevant part: "My initial check of the summary list exclusives for the center indicate that there are none that would effect [*sic*] the menu, but I want our Lease Administrator to verify that there aren't any. Subway would be my main concern. The list says they don't have one, but usually they do, so I just need to have it verified. I will let you know as soon as I find out . . . ." Zoubovitch's declaration, submitted in support of summary judgment, also stated that the Ross lease restriction limiting the number of restaurants permitted between Ross and another anchor tenant "was not listed on the summary list of restrictions and exclusives," and that defendant "DDR was not previously aware that the restrictive use provision existed in the lengthy lease . . . ."

[15] In their separate statement, relying upon Zoubovitch's declaration, defendants asserted: "In conducting his initial due diligence, and consistent with his usual practice, Zoubovitch checked the Center's summary list of exclusives and restrictions ('Summary List') to determine whether SMDM's use might violate an existing tenant's lease." Zoubovitch particularly wanted to ensure that no other restaurants in the Center had restrictions or exclusive-use provisions that would affect a Wings To Go menu. "Both Zoubovitch and his lease administrator checked the Summary List, found no potential issues, and advised SMDM of this fact on or about April 7, 2006."

Plaintiffs disputed that Zoubovitch had checked the summary list at all and further disputed his assertion that the pertinent restrictions and exclusions of the Ross lease were not contained in the summary list. They stated that the Ross exclusions *were* listed on the summary list, relying upon the summary list produced by defendants during discovery and dated July 11, 2006. This summary list contained the exclusion.[16] Further, plaintiffs maintained that Zoubovitch was familiar with Ross's usual restrictions and exclusions based on his admitted past experience with Ross and that he and DDR *should have discovered* any potential conflicts based on the summary list and review of the Ross lease itself, particularly as DDR had been Ross's landlord for the previous four years.

Plaintiffs adequately identified the alleged negligent misrepresentation for purposes of withstanding summary judgment. Zoubovitch's representation to Colbert that he and his lease administrator had checked the summary list and that their initial check had disclosed no issues may have been accurate, as defendants maintain it was. However, the summary list included in the record discloses the exclusion. Consequently,

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[16] We note that the trial court *sustained* defendants' objection to that portion of Colbert's declaration wherein she stated, "In conducting his initial due diligence and consistent with his usual practice, I am informed and believe that Mr. Z failed to check the Center's summary list of exclusives and restrictions ('Summary List') to determine whether SMDM's use might violate an existing tenant's lease, because the Center's 'Summary List' list[s] all tenants restrictions and exclusions right on it, see Ex DDR 0778 #862009. I am also informed and believe that he failed to check the tenants leases at Hilltop Plaza so that violations of exclusions and restrictions do not occur." Defendants' objections were made under Evidence Code sections 1200 [hearsay], 702 [lack of personal knowledge], and 800 [opinion].) *Plaintiffs do not challenge the sustaining of this objection* on this appeal, although they refer in their briefs to the summary list and the fact that it did contain the exclusion. Although the court sustained the objections made to Colbert's opinion and beliefs with respect to Zoubovitch's actions, it is not clear that the court actually sustained any objection to the summary list (exh. No. DDR 778) itself. Zoubovitch referred to the summary list he reviewed in his declaration, although not to the specific exhibit No. DDR 778. Nor do defendants contend on appeal that the summary list was ruled inadmissible. Rather, they argue that there is "no evidence that the summary list produced in litigation is the same list reviewed by Zoubovitch." We conclude the court did *not* exclude the summary list (exh. No. DDR 778), but only those portions of Colbert's statements made on information and belief and without personal knowledge regarding Zoubovitch's actions.

triable issues of material fact are presented as to whether the summary list was actually checked by Zoubovitch and his lease administrator; if so, whether the list included in the record was the operative summary list at the time Zoubovitch and the lease administrator reviewed it; whether Zoubovitch's representation that their initial check revealed no issues was made without reasonable grounds for believing it to be true; and whether, even if it were absent from the summary list, defendants reasonably should have been aware of this material exclusion in the Ross lease, before representing that the initial check revealed no issues.

As we have observed, an implied assertion or representation is an insufficient basis for a negligent misrepresentation cause of action. Rather, a positive assertion is required. (*Apollo Capital Fund LLC v. Roth Capital Partners, LLC, supra,* 158 Cal.App.4th at p. 243.) Defendants argue that the only statement on the subject of exclusives and restrictions was a "completely accurate statement" by Zoubovitch that "[m]y initial check of the summary list exclusives for the center indicate that there are none that would effect [*sic*] the menu, but I want our Lease Administrator to verify that there aren't any. Subway would be my main concern. The list says they don't have one, but usually they do, so I just need to have it verified. I will let you know as soon as I find out . . . ." Nevertheless, we believe this statement may reasonably be construed as positive representations both that Zoubovitch had checked the summary list, and that the list disclosed no potential issues. We are mindful that the summary judgment standard of review requires us to " ' " 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " ' [Citation.]" (*Tverberg v. Fillner Construction, Inc., supra,* 49 Cal.4th at p. 522.) Moreover, defendants' separate statement asserted as an undisputed material fact that "[b]oth Zoubovitch and his lease administrator checked the Summary List, found no potential issues, and advised SMDM of this fact on or about April 7, 2006." That defendants checked the summary list and found no potential issues are sufficiently positive assertions to support this cause of action. Whether that statement could reasonably have been made, given the apparent presence of the Ross exclusion on the

summary list is a question of fact. That Zoubovitch may have been focused on a specific other restaurant and its particular menu restrictions may explain why he may have missed the Ross exclusion, assuming it was present on the summary list. It does not render the statement less positive.

Defendants also maintain that Zoubovitch had "not merely a 'reasonable' but an *actual basis* for believing that no exclusives affected the menu," as well as "an actual basis to believe that no exclusives existed that would affect . . . overall *operations.*" They assert that "the subject Ross restriction was not listed on the summary list *reviewed by Zoubovitch or his administrator*," and that plaintiffs have offered no evidence contrary to this assertion. The summary list itself appears to contradict this assertion. That list was relied upon by plaintiffs in their opposition to summary judgment and was made part of their separate statement. It was evidence and served to create a triable issue of fact as to whether there was a reasonable basis for the alleged negligent misrepresentation.

The remaining elements of plaintiffs' reasonable reliance and damages similarly present triable issues of material fact.

" 'Actual reliance occurs when a misrepresentation is " 'an immediate cause of [a plaintiff's] conduct, which alters his legal relations,' " and when, absent such representation, " 'he would not, in all reasonable probability, have entered into the contract or other transaction.' " [Citations.] "It is not . . . necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision." ' (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976-977.)" (*Conroy v. Regents of University of California, supra,* 45 Cal.4th at p. 1256.)

Defendants assert that any reliance by plaintiffs upon this statement was unreasonable in light of the explicit language of the Letter of Intent. However, unlike the contract-based causes of action and the promissory estoppel cause of action, plaintiffs' reliance here was not reliance upon the asserted existence of a deal or the representation

that there was a deal. Rather, plaintiffs' asserted reliance was in continuing to move forward toward the deal and in taking various actions, including initial expenditures of money, not because the parties had a deal, but because plaintiffs had received adequate assurances that a preliminary review of lease restrictions through the summary list had disclosed no issues. In short, plaintiffs had received a preliminary assurance that the summary list of other leases disclosed no apparent road blocks to a deal. Whether plaintiffs in fact relied upon the statement to continue to move forward, the extent of any such actual reliance, and whether any such reliance was *reasonable*, are questions of material fact for the trier of fact. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [" 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact.' [Citations.]"]; accord, *Whiteley v. Philip Morris, Inc.* (2004) 117 Cal.App.4th 635, 678.)

For these reasons, we conclude the trial court erred in granting summary adjudication on the negligent misrepresentation cause of action.

III. Attorney Fees

Plaintiffs contend that the court erred in striking the prayer for attorney fees in their first amended complaint and that they are entitled to a trial on the issue of attorney fees as consequential damages arising from Zoubovitch's alleged negligent misrepresentations regarding the transaction. We disagree.

"The basic rule governing the right to an award of attorney fees in American jurisprudence is that regardless of who prevails in litigation, each party must bear his or her own attorney fees. [Citations.]" (Pearl, Cal. Attorney Fee Awards (Cont.Ed.Bar 3d ed. 2010) § 1.2, p. 3.) Code of Civil Procedure section 1021 codifies this rule: "Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties." Parties to a contract may agree that a prevailing party may recover attorney fees for work attributable to tort and other noncontract claims, in addition to work on contract causes of action. (*Santisas v. Goodin* (1998) 17 Cal.4th 599,

608.) Plaintiffs have cited to *no* provision in the purported agreement entitling them to such attorney fees. Indeed, plaintiffs *objected* to the more narrowly drawn attorney fee provisions that were contained in the draft lease agreement. Colbert faxed DDR's counsel with changes to the agreement, including: "4. All parties pay their own attorney fees in any arbitration or court of law if any, already communicat[ed] to DDR." Colbert's handwritten notations were the same, stating: "All parties pays their own attorney fee! if any all ready communicated to DDR [*sic*]."

None of the authorities relied upon by plaintiffs supports their assertion that they would be entitled to attorney fees as consequential damages should they prevail upon their negligent misrepresentation claim. Nor is this one of the very limited cases in which attorney fees may be awarded as damages under the "tort of another" doctrine. (See, e.g., *Olsen v. Arnett* (1980) 113 Cal.App.3d 59, 67; Pearl, Cal. Attorney Fee Awards, *supra,* § 1.11, p. 8.) Under that doctrine, attorney fees may be recovered as damages where a wrongdoer's misrepresentations, fraud, or bad faith required the plaintiff to bring or defend a lawsuit *against a third person*. (*Prentice v. North Amer. Title Guar. Corp*. (1963) 59 Cal.2d 618, 620; Pearl, Cal. Attorney Fee Awards, *supra,* §§ 1.11, 7.4, pp. 8, 397.)

Absent any contractual attorney fee provision broad enough to cover such a claim, plaintiffs fail to show that the court erred in striking the attorney fee provision from their first amended complaint.

IV. Colbert's Standing

Defendants assert in a footnote to their respondents' brief that Colbert never had standing as a plaintiff in this action, and that they raised the issue in their demurrer and in the motion for summary judgment. They cite to footnotes in their memoranda of points and authorities in support of the demurrer and in support of summary judgment, to the Letter of Intent, and to the draft franchise agreement between Wings to Go and defendant SMDM Properties Inc. The trial court did not address the question either in sustaining the demurrer or in granting summary judgment. Defendants' argument regarding Colbert's lack of standing is not adequately presented or supported by authorities and we

do not address it here. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 9.21, p. 9-6.)

CONCLUSION

We conclude the trial court erred in entering summary judgment/summary adjudication for defendants on plaintiffs' cause of action for negligent misrepresentation with respect to Zoubovitch's statements to Colbert regarding the summary list of exclusions and restrictions. We find no error in the court's striking the attorney fee prayer from the first amended complaint, sustaining the demurrer to various causes of action of the second amended complaint, and granting summary adjudication on the cause of action for promissory estoppel and on the cause of action for negligent misrepresentation insofar as that cause of action was based on the statement that Zoubovitch's boss had approved the deal.

DISPOSITION

We reverse the judgment and remand to the trial court for further proceedings on the negligent misrepresentation cause of action for statements made regarding the summary list of exclusions. In all other respects, we affirm.

_____
Kline, P.J.

We concur:

_____
Haerle, J.

_____
Lambden, J.